



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 2260 OF 1982**

**NEWSTANLEY HOTEL LIMITED .....PLAINTIFF**

**VERSUS**

**ARCADE TOBACCONISTS LIMITED.....DEFENDANT**

**RULING**

By chamber summons the applicant defendant is asking that the execution of a judgment of mine on January 22, 1986 be stayed pending appeal. A notice of appeal has been filed and I have jurisdiction to consider the matter under order XLI rule 4 of the Civil Procedure Rules.

The applicant is a tenant of the respondent and in what I see as a lengthy judgment, I found that the plaintiff was entitled to possession and to mesne profits from July 1, 1982 to the date of possession. It is one of those cases in which the respondent's lease expired and the plaintiff gave notice of increase of rent which in practice is the issue which was contested. The premises concerned are a small tobacconists shop in the New Stanley Hotel building.

Order XLI rule 4(2) requires me before making such an order of stay to be satisfied that substantial loss may result to the applicant unless the order is made and that the application was made without unreasonable delay. On those matters the following considerations appear relevant:-

(1)The ground of appeal will be, as it was a matter for consideration before me, that the applicant herein at the end of the tenancy became a tenant from month to month and entitled to protection and notice as provided in cap 301. I have decided that that is not so and that is a matter which will be going to the Court of Appeal. If the appeal is successful then the tenant is in the position where he cannot be required to pay any more than the rent which is due under the Act. It is agreed between the parties that he is paying that amount and specifically there is no requirement by the plaintiff for security in respect of it. We are only therefore talking about security to cover the amount of money which will be payable by way of mesne profits if the appeal is not successful. There is no dispute that this application has been brought without unreasonable delay.

(2)Order XLI rule 4(2)(b) provides for such security as the court orders for due performance of the decree. The point raised by the defendant is that this court was not invited or given sufficient evidence to establish the amount of mesne profits. The matter was not argued by either side at the trial. Mr Shah for the plaintiff is of the view that the amount of mesne profits is to be assessed after. Mr Oraro for the defendant puts his case on the basis that whether that is so or not one cannot quantify the amount of mesne profits and therefore one cannot make an order for security in respect of it.

The amount of mesne profits is a very considerable sum and Mr Shah has attached to his affidavits a report from Milligan & Company who have given a valuation of the property. A similar report which comes to no conclusion about the valuation is filed on behalf of the defendant. It is to some extent critical of the valuation report filed by Mr Shah.

Mr Oraro says you cannot establish the amount of mesne profits due and payable under my order in this application. All we have here is affidavits which are not open to cross-examination and the court would be unwise to try in this application to come to a figure for mesne profits. Mr Shah says he puts forward

his affidavit of valuation only on the basis of trying to assist the court to see, not what the proper figure for mesne profits should be, but to assist in coming to the sort of figure which should be required in security on this appeal.

It seems to be agreed between the parties on reading of the affidavits that there is very little likelihood of the defendant being able to pay the sort of rent which was demanded by the plaintiff, a figure upon which mesne profits might be based, or indeed the sort of sum which the valuer is suggesting which is a good deal higher. It follows therefore if any real security were to be taken I might find myself depriving the defendant of his right of appeal and I would be most unhappy in doing that, particularly where the point involved is as difficult as I found it to be, covered, so far as I could trace, by no direct authority and requiring an assessment by the court of the manner in which equity was to operate.

Accordingly my view is that the best thing to do in this case is to grant the application for stay of execution of the proceedings pending appeal, and to allow the plaintiff if he wants and if he can to proceed to assess the value of the mesne profits, always assuming that the court will hear such a valuation when an appeal is pending. On assessment, if that is done, on the value of mesne profits, in the particular circumstances of this case the court requires a personal bond from the defendant applicant that he will pay the sums due on determination of the appeal. The defendant applicant to pay costs of this application to be agreed or raised.

**Dated and Delivered in Nairobi this 9th day of May 1986**

**D.C.PORTER**

**JUDGE**